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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY GLOVER,

Defendant and Appellant.

A135985

(Solano County Super Ct.
No. FCR288745)

Defendant Henry Glover seeks reversal of the judgment below, in which he was found guilty of possessing a concealed firearm, on the ground the police conducted a patdown search of him that violated his federal constitutional rights against improper search and seizure. We affirm the judgment in its entirety.

BACKGROUND

In November 2011, defendant was charged by felony complaint with one count of having a concealed firearm upon his person (Pen. Code, § 12025, subd. (a)(2)).¹ A preliminary hearing before a magistrate was held, at which defendant's motion to suppress evidence pursuant to section 1538.5 was also heard. David Neal and Alexandria LeBlanc testified, on behalf of the prosecution and defense respectively.

Testimony of Officer David Neal

Officer David Neal of the Fairfield Police Department testified that on the afternoon of October 27, 2011, he was on patrol, in uniform and armed, with parole agent Donovan Lewis, also armed, in the Parkway Gardens community in Fairfield, California,

¹ All statutory references herein are to the Penal Code.

which Neal knew from experience to be a high-crime neighborhood. They were looking for a suspect in a prior gun case. A security guard flagged them down and said he was “watching a group of females and males loitering to the rear of one of the condos . . . inside Parkway Gardens, and there was—they were arguing and fighting, and he’d been contacted by some other residents there.” Neal understood he had permission from the homeowners association to enforce the trespass ordinance there. He informed dispatch and he and Lewis approached the group on foot “in an open area in the middle of the complex.”

Neal said he observed “a large group of adult males and females and some smaller children. There was a lot of yelling going on back and forth.” The females were arguing and the males were standing around, looking on. He could not tell if the yelling was going to escalate, “but it was just back and forth, a lot of commotion.” There were no other officers present at this initial contact, although there were other officers later.

Neal further testified that he noticed defendant in the group that was arguing, standing with females and small children, because he resembled the suspect in the gun case. Defendant “was standing there with the females who were arguing, . . . but he was not physically fighting with anyone.” As Neal approached, he realized defendant was not the suspect. However, Neal recognized defendant as someone with whom he had had prior contacts in Parkway Gardens, including about loitering a couple of months before. Neal did not know defendant’s name, but knew he was “always hanging out in the area and [did] not live in the complex.”

Neal said he smelled the “very strong” odor of fresh marijuana coming from defendant’s person when he got within five or six feet of defendant. Neal was sure the odor of marijuana came from defendant because he smelled it when the others left the immediate area and he was standing with Lewis and defendant only.

Neal also testified that he asked defendant a series of questions in his initial contact with him. Defendant said he thought he was on probation, indicated he did not live at Parkway Gardens, and was evasive about whether he had marijuana on his person.

Defendant also did not respond when asked his name, although Neal did not include this in his police report.

Asked if defendant made any furtive movements or if his demeanor was questionable, Neal testified, “he was evasive at the beginning . . . and throughout most of the contact he didn’t want to provide his name . . . he just kind of stood there.” Defendant did not make any furtive movements or threatening statements. Also, defendant was wearing “completely baggy clothes” that concealed his waistband from view. This concerned Neal because defendant “could easily conceal things underneath his oversized baggy shirt and pants, and due to the nature of the area that we were in, it was definitely a concern for mine and Officer Lewis’s safety.”

Neal said he then conducted a patdown search of defendant for officer safety. He felt the handle of a pistol in defendant’s waistband. The officers removed from defendant’s waistband a semi-automatic nine-millimeter pistol, loaded with a magazine and ready to be fired, and placed defendant in handcuffs. Later, the officers determined the pistol’s serial number had been altered so that it could not be read.

Neal handcuffed defendant and transported him to the police station. On the way, defendant stated spontaneously that he found the gun in a trash can and was just holding it. Later, after Neal read defendant his *Miranda* rights, defendant said the gun was not his, he had found it in a trash can, and he did not live at Parkway Gardens.

Testimony of Alexandria LeBlanc

Alexandria LeBlanc, a resident of Parkway Gardens, testified that she was with a group that included defendant, a long-time friend of hers, when two officers arrived. LeBlanc was standing right next to defendant, holding her baby; about five people were present in the group and defendant was the only male. There had been a fight between girls from the high school up the street, but LeBlanc had broken it up before the officers arrived.

The officers walked up to defendant and asked him his name. Defendant responded, “My name is Henry Glover.” A police officer said, “That’s not your name,” put defendant’s hands behind his back, and started to arrest him. Defendant said, “That is

my name,” and LeBlanc said, “That really is his name.” The police still put defendant’s hands behind his back and arrested him.

LeBlanc testified that she offered to get defendant’s aunt, a Parkway Gardens resident with whom defendant often stayed, to prove defendant’s identity, but the police did not listen to her. LeBlanc did not know where defendant lived.

LeBlanc said she was familiar with the odor of marijuana and did not smell it on defendant or anyone else in the area at the time of the incident, nor did she hear the police ask defendant about marijuana. She saw the police pat down the exterior of defendant’s body. There was a piece of paper in defendant’s pocket that had his name on it and LeBlanc pointed that out, but police just threw the paper on the ground.

LeBlanc also said two officers approached the group, “but as you turned the corner from where their car was parked at, there were many more.”

The Magistrate’s Ruling

The magistrate denied the motion to suppress. The magistrate found “credible evidence that there was a strong odor of marijuana emanating from defendant” and that the officers were investigating in a high crime area. The magistrate observed, “two persons witnessing the same event often see or hear it differently,” and stated, “that’s I think what happened here. I’m certainly not going to suggest that either of the witnesses lied.” The magistrate concluded, “the officer’s conduct was reasonable. The odor of marijuana emitting from the defendant justified a patdown, in my opinion, and also for officer safety, which was articulated by the officer, regarding this high crime area and the defendant’s appearance, I think the officer’s conduct was reasonable under all the circumstances.”

Defendant’s Motion to Set Aside the Information

Defendant was later charged by information with one count of having a concealed firearm upon his person, to which he pled not guilty. He moved to set aside the information pursuant to sections 1538.5, subdivision (i) and 995 because of legal error by the magistrate. The court denied the motion.

Subsequently, defendant changed his plea to no contest and was found guilty as charged. The court suspended imposition of sentence and placed defendant on three years probation with credits for time served. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues the police patdown search violated his rights under the Fourth Amendment of the United States Constitution.² Therefore, the evidence obtained as a result of this search, that being the pistol and defendant's statements to police, should have been suppressed and the judgment must be reversed. We conclude the pat down was constitutionally permissible under the totality of the circumstances.

“ ‘On appeal from a section 995 review of the denial of a defendant's motion to suppress, we review the determination of the magistrate at the preliminary hearing. [Citations.] We must draw all presumptions in favor of the magistrate's factual determinations, and we must uphold the magistrate's express or implied findings if they are supported by substantial evidence.’ ” (*People v. Hawkins* (2012) 211 Cal.App.4th 194, 200.) “ ‘We judge the legality of the search by “measur[ing] the facts, as found by the trier, against the constitutional standard of reasonableness.” [Citation.] Thus, in determining whether the search or seizure was reasonable on the facts found by the magistrate, we exercise our independent judgment.’ [Citation.] We will uphold the magistrate's ruling if it ‘is correct on any theory of the law applicable to the case, even if

² “The Fourth Amendment provides ‘[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated’ [Citation.] This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states. [Citation.] A similar guarantee against unreasonable government searches is set forth in the state Constitution [citation] but, since voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard. [Citations.] ‘Our state Constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court.’ ” (*People v. Camacho* (2000) 23 Cal.4th 824, 829-830, fn. omitted.)

the ruling was made for an incorrect reason.’ ” (*People v. Guzman* (2011) 201 Cal.App.4th 1090, 1096.)

As defendant points out, “No right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of the law.” (*Terry v. Ohio* (1968) 392 U.S. 1, 9 (*Terry*).) With this right in mind, the *Terry* court held that limited searches for the purposes of officer safety are permissible under certain circumstances. “Each case of this sort will, of course, have to be decided on its own facts. . . . [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.” (*Id.* at pp. 30-31.)

The “protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger;” also, “danger may arise from the possible presence of weapons in the area surrounding a suspect.” (*Michigan v. Long* (1983) 463 U.S. 1032, 1049.) “[A] pat-down search for weapons may be made predicated on ‘specific facts and circumstances giving the officer reasonable grounds to believe’ that defendant is armed [citation] or on other factors creating a potential for danger to the officers.” (*People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956.) “[T]he officer need not be absolutely certain that the individual is armed; the crux of the issue is whether a reasonably prudent person in the totality of the circumstances

would be warranted in the belief that his or her safety was in danger.” (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1074, citing *Terry, supra*, 392 U.S. at p. 27.)

In other words, “ ‘it will suffice that there is a substantial possibility the person is armed, and . . . there need not be the quantum of evidence which would justify an arrest for the crime of carrying a concealed weapon. Sometimes this possibility may be said to exist merely because of the nature of the crime under investigation, while on other occasions something in addition will be required, such as a bulge in the suspect’s clothing, a sudden movement by the suspect toward a pocket or other place where a weapon could be hidden, or awareness that the suspect was armed on a previous occasion. The test is an objective one, and thus the officer need not later demonstrate that he was in actual fear.’ ” (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1061.)

Also, reviewing courts “must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing. . . . Although an officer’s reliance on a mere ‘ ‘hunch’ ’ is insufficient to justify a stop, [citation], the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” (*United States v. Arvizu* (2002) 534 U.S. 266, 273-274.)

In the present case, we conclude the officers’ patdown search of defendant’s exterior was constitutionally permissible because the totality of the circumstances supported the objectively reasonable concern that criminal activity might be afoot and defendant might be armed and presently dangerous. Furthermore, nothing in the officers’ initial encounter with defendant served to dispel this reasonable concern.

The trial court neatly summarized the relevant facts in the record in the course of denying defendant’s motion to set aside the information. Among other things, the court noted that Neal had been flagged down by a security guard in the apartment complex “in the area that was notorious for high-crime, that there was a disturbance that was going on, the people had been calling, [and] males and females were involved.” The court referred to Neal’s testimony that he saw a large group of males and females as he approached,

heard a lot of yelling back and forth, did not know if it was going to escalate, and observed “ ‘a lot of commotion.’ ”

The court stated, “So this was a situation where he had been called over to handle this by a security guard. He heard the arguing, males and females, and went over to investigate. Given the reputation of the particular community involved—he would have legitimately had some concerns for officer safety. But be that as it may, as he approached [defendant] and got within a short distance of him, he testified that he smelled the odor of marijuana, and he stated that the defendant was very close to him, and the other people were not close at the time he smelled this marijuana.

“There were other people around, but he testified clearly . . . that it was coming directly from [defendant.] So this officer did not approach someone where he had no reasonable suspicion of any involvement in criminal activity; he had some suspicion, and so he did have reasonable grounds to detain.

“And under the law, if there are reasonable grounds to detain, the officer has the right to pat search for officer safety. There may not have been grounds to arrest. But for a detention—limited detention for investigative purposes, this officer clearly was within the law[.]” Accordingly, the court denied the motion.

In addition to these facts, Neal testified that defendant, while not arguing or fighting when Neal arrived, was “in” the group making the “commotion” when Neal arrived; the security guard indicated that multiple residents had complained about a “fight” to security; and Neal and Lewis, approaching on foot, encountered “a large group of adult males and females and some smaller children” in an open area in the middle of the apartment complex.

Additionally, Neal smelled the “very strong” odor of fresh marijuana coming from defendant when Neal got within five or six feet of him. Such a strong odor from that distance, as well as Neal’s failure to respond to Neal’s query about marijuana, gave Neal an objectively reasonable suspicion that defendant could be under the influence (and, therefore, not necessarily in control of his behavior) and in illegal possession of marijuana. Furthermore, such suspicion about defendant’s activities was heightened

because Neal knew defendant did not live in the apartment complex and had been contacted there for loitering a couple of months before.

Also, nothing in the initial stages of Neal's encounter with defendant served to dispel his reasonable concern for officer safety. According to Neal, defendant, after indicating he thought he was on probation and did not live in the complex, did not give a direct answer as to whether he had marijuana with him or provide his name when asked. He also wore baggy clothing, making it difficult for the officers to determine from a visual observation if he was armed.

Based on these facts and those cited by the trial court, we conclude the totality of the circumstances the officers encountered furnished them with objectively reasonable grounds to be concerned about officer safety, suspect criminal activity, including violent criminal activity, was afoot, and believe that defendant could be armed and dangerous. Neal and Lewis approached on foot a large group of men and women located in the middle of an apartment complex in a high crime area who were reportedly involved in a disturbance that might have involved physical assault, the officers observed a potentially combustible commotion and defendant, a non-resident, in the middle of it, reeking of marijuana, being evasive in his responses to questions, and wearing clothing that could conceal a weapon. It was reasonably prudent for the officers to conduct a patdown search of defendant in the course of further investigating what they encountered. Therefore, their limited patdown search of defendant's exterior was constitutionally permissible.

Defendant does not present any persuasive arguments to the contrary. Rather than discuss the totality of the circumstances, he largely ignores Neal's testimony about the report of the fight that brought the officers to the scene in the first place, as well as much of Neal's account about the large group of men and women and the uncertain commotion he observed. Instead, defendant takes some of the circumstances involved, such as that the officers were in a high crime area, defendant did not make any furtive gestures, defendant was wearing baggy clothing, Neal smelled marijuana, defendant refused to give his name, and defendant indicated he was on probation, and discusses case law that suggests each one, standing alone, is not a legitimate basis for a patdown search.

For example, defendant cites case law which states that, while an officer being in a high crime area may be a factor in evaluating the reasonableness of a “*Terry* frisk” for weapons, it should be appraised with caution because “[t]he spectrum of legitimate human behavior occurs every day in so-called high crime areas” (*People v. Medina* (2003) 110 Cal.App.4th 171, 177); reasonable suspicion, even just to detain someone, “cannot be based solely on factors unrelated to the defendant, such as criminal activity in the area” (*People v. Perrusquia* (2007) 150 Cal.App.4th 228, 233); police do not have the authority “carte blanche to pat down anyone wearing baggy clothing” (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1377, fn. 1); and police may not “assume that any person possibly engaged in a narcotics transaction . . . is armed and dangerous.” (*Santos v. Superior Court* (1984) 154 Cal.App.3d 1178, 1185.) In none of these cases, or in the other cases cited by defendant, did police encounter the significant collective dangers and possible criminal activity described by Neal in the present case.

We must review the totality of the circumstances, rather than engage in a “ ‘divide-and-conquer’ analysis in which individual facts are considered in isolation.” (*People v. Perrusquia, supra*, 150 Cal.App.4th at p. 233.) Thus, in *People v. Collier, supra*, 166 Cal.App.4th 1374, one of the cases cited by defendant, officers engaged in a routine traffic stop in the afternoon smelled the strong odor of marijuana emanating from inside the passenger side of the vehicle, where defendant sat, dressed in baggy clothes. (*Id.* at p. 1376.) The officers conducted a patdown search of the defendant and found a loaded nine-millimeter handgun and a jar of PCP. (*Id.* at pp. 1376-1377.) The trial court denied a motion to suppress based on these facts. (*Id.* at p. 1377.) The appellate court found that, although the defendant’s presence in the car “was not probable cause to arrest him for a drug offense, it furnished a rational suspicion that he may have been in possession and transportation of drugs.” (*Ibid.*) The court ruled that the trial court “correctly and reasonably ruled that there were specific and articulable facts to conduct a limited patdown based on officer safety and the presence of drugs,” even though there were “no furtive gestures, no gang evidence, and the traffic stop was not in a high-crime area,” so that police could safely search the car interior and further investigate. (*Id.* at p.

1378.) The totality of the circumstances in the present case involves a greater danger than that discussed in *Collier*.

In short, defendant's various arguments are unpersuasive because he largely ignores the totality of the circumstances of the present case. Therefore, we need not discuss the case law defendant cites in any further detail.

Defendant also contends the officers were told that the "disturbance" reported to them by the security guard was between females. However, the record does not establish this point. Neal testified on direct that he was told by the security guard that a group of males and females . . . were arguing and fighting[.]" Later, on cross examination, as Neal described what he himself observed upon approaching the group, he was asked, "And what you were told was females were fighting?" Neal responded, "Females and males—females were arguing, and there were males standing around, yes." Asked, "[s]o the males were not involved in the fight, as far as you knew?" Neal replied, "Other than being onlookers as far as I knew, yes." The magistrate could reasonably construe this testimony together as indicating Neal was told by the guard that both males and females were involved in fighting and arguing, but observed only females arguing. We so construe the record, as " '[w]e must draw all presumptions in favor of the magistrate's factual determinations, and we must uphold the magistrate's express or implied findings if they are supported by substantial evidence.' " (*People v. Hawkins, supra*, 211 Cal.App.4th at p. 200.)

Finally, defendant points to certain aspects of LeBlanc's testimony that support his version of the facts. This includes her testimony that defendant did in fact give his name to police and did not smell of marijuana. Defendant points out the magistrate indicated LeBlanc was a credible witness. However, the magistrate did not state that LeBlanc's account was accurate, but only that he was not suggesting that LeBlanc or Neal had lied. Again, " 'we must uphold the magistrate's express or implied findings if they are supported by substantial evidence.' " (*People v. Hawkins, supra*, 211 Cal.App.4th at p. 200.) Neal's testimony that he smelled the strong odor of fresh marijuana emanating

from defendant, and that defendant would not give the officers his name, provided substantial evidence in support of the court's ruling.

Defendant also points to LeBlanc's testimony that she observed more police officers around the corner to contend the two officers who approached the group had no reason to believe they were outnumbered. However, nothing in the record indicates Neal or Lewis were aware of any such officers' presence initially, and Neal testified that there were no other officers present when he made the initial contact with defendant. Therefore, defendant's contention is of no consequence in our analysis.

Given our conclusion, we do not address the People's argument that the pistol was discovered as part of a valid search incident to arrest for loitering and/or trespass.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.